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In the

Supreme Court of the United States

October Term, 1973

No. 73-1109

JESUS CANALES, et al.,

Petitioners,

vs.

CITY OF ALVISO AND CITY OF SAN JOSE,

Respondents.

Brief of Alviso Ad Hoc Committee, Amicus Curiae, in Support of Petition for Certiorari

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INTEREST OF AMICUS CURIAE

The Alviso Ad Hoc Committee is a nonpartisan unincorporated association with membership consisting almost entirely of residents of and voters in the City of Alviso, California. It is engaged solely in defense of the basic legal rights and interests of

Alviso residents, qua residents, and especially those many City residents of Mexican ancestry. During its existence it has been particularly concerned with preserving fundamental democratic standards for the expression of popular will by Alviso residents in elections to determine whether the City of Alviso should consolidate with the City of San Jose.

Resultantly, the Alviso Ad Hoc Committee is no less concerned that certain requirements of California Elections Code Section 20024 are unconstitutional on their face and as applied insofar as they place a constitutionally impermissible and logically impossible burden on election contestants, Petitioners herein. Such requirements compel Petitioners to establish not only that illegal votes were cast in a number equal to or exceeding the differential between "yes" votes and "no" votes, but to prove that such votes actually determined the election.

The consent of the attorneys for petitioners has been orally obtained; the consent of the attorneys for respondents has been orally denied.

STATEMENT OF THE CASE

The *Petition for Writ of Certiorari* brings before this Court an appeal of an election contest arising from the last of three elections held between 1960 and 1968 in which the electors of the City of Alviso were to determine whether to consolidate the City of Alviso with the City of San Jose. Consolidation was twice defeated by Alviso voters. In the last election,

held on January 9, 1968, the consolidation measure passed by nine votes (189-180). The Court below found that nine votes were cast illegally. The precise circumstances of this election, and of this lawsuit, are set out in some detail in the *Petition for Writ of Certiorari*, pp. 2-9. The Alviso Ad Hoc Committee respectfully joins in requesting this Honorable Court to review the refusal of the Court below to set aside an election on the basis that contestants failed to meet the proof burden established by California Elections Code Section 20024.

QUESTION PRESENTED

Whether, in an election contest won by a number of votes equalled or exceeded by the number of illegal votes cast therein, the burden placed on contestants under California Elections Code Section 20024, to prove that illegal votes actually determined the election, violates the Fourteenth Amendment where the Court did not purge the polls but rather based its finding that contestants failed to meet their proof burden on mere circumstantial evidence, which evidence was incorrectly reviewed by appellate courts under the substantial evidence rule.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Courts below decided an important question of Constitutional law which has not been, but should be settled by this Court, namely whether, in an election contest

won by a number of votes equalled or exceeded by the number of illegal votes cast therein, the burden placed on contestants under California Elections Code Section 20024, to prove that illegal votes actually determined the election, violates the Fourteenth Amendment where the Court did not purge the polls but rather based its finding that contestants failed to meet their proof burden on mere circumstantial evidence, which evidence was incorrectly reviewed by appellate courts under the substantial evidence rule. Judicial solutions to this question to date have been quixotic and incompatible with the high position and integrity afforded the electoral process by the Fourteenth Amendment. *Reynolds v. Simms*, 377 U.S. 533, 12 L. Ed. 523 (1964).

Where an election is won 189-180, a Court finding of nine illegal but undetermined votes should be sufficient to void the election as a matter of law.

This issue has never been directly faced by the United States Supreme Court. In 1890, the California Supreme Court laid the seeds of the present Constitutional controversy in *Russell v. McDowell*, 83 Cal. 70, 23 P. 183, which directed that the undetermined illegal votes were to be prorated among the parties where there is no evidence of how those votes were cast. *Singletary v. Kelly*, 242 C.A. 2d 611, 51 Cal. Rptr. 682 (1966) followed *Russell v. McDowell, supra*, without discussion. Both cases were approved in *Canales v. City of Alviso*, 3 C. 3d 118 at 127, 89 Cal. Rptr. 601 at 607, 474 P. 2d 417 at 422 (1970).

The *Russell* case, *supra*, was grounded on the fundamentally unworkable presumption that courts can and should determine how illegal voters voted. Said case proposes that this be accomplished either by attempting to correlate the illegal voters with their illegal ballots, or by introduction of extrinsic evidence with the burden of proof on contestants. Interestingly, ballot inspection in *Russell, supra*, failed even to establish by whom the illegal votes were cast. Because no extrinsic evidence was introduced, proration resulted. *Russell, supra*, 83 Cal. at 72-73.

Six years after *Russell, supra*, the secret ballot was established in the California Constitution, Cal. Const., Art. II, para. 5 (1896), thereby precluding judicial attempts to match and identify voters and their votes by physical identification. Thus the only *Russell* alternative to survive the secret ballot was to determine the directives of ballots in question by extrinsic evidence. Such a solution leaves unanswered the question of how such illegal votes were actually cast. Absent an accurately and objectively verifiable answer to this question there is no feasible solution tolerable under the Fourteenth Amendment other than to void the election as a matter of law.

This conclusion is constitutionally unavoidable in that the only alternative results in the highly uncertain and questionable proposition that an accurate reconstruction of electoral data is possible without the inescapable dilution of votes legally cast by those cast illegally. In the rare instances in which

elections are decided by a number of votes which differential is equalled or exceeded by votes illegally cast under suspect circumstances, the only constitutional course consistent with *Reynolds v. Simms*, *supra*, 377 U.S. at 555 is to direct a new election. This is especially so in light of the above mentioned secret ballot provision of the California Constitution which precludes the only true and accurate means of determining which side of the scale the weight of the illegal votes should fall.

The fundamental unfairness to all electors by not voiding such an election was articulated in Paine, *A Treatise On the Law of Elections to Public Offices* (1890) which states:

> "Where the illegal votes have been cast, the true rule is to purge the poll, by first proving for whom they were cast, and thus ascertaining the real vote; but if this cannot be done, then to exclude the poll altogether. This is safer than the rule which arbitrarily apportions the fraud among the parties." p. 433 n. 3.

A purge of the polls, that is, matching the vote with the person who cast it, is now legally precluded by unnumbered, unidentifiable secret ballots and by widespread use of voting machines.

The California Court of Appeal did not establish an appropriate judicial standard for treatment of illegal votes where such votes outnumbered the election differential. The Court stated that "Everything must be resolved in favor of upholding an election." *Canales et. al. v. City of Alviso*, 1 Civil, No.

31783, First App. Dist., Div. Two, filed August 21, 1973, p. 32, cert. den., October 18, 1973. It is submitted that the validity and integrity of the electoral process and the election result should be the appropriate standard. This cannot be done if the courts place an extremely onerous, if not impossible, burden on election contestants who have amply demonstrated there were as many or more illegal votes than separated the prevailing from the losing mandate.

Moreover, the position of the Court below is based on the review of the trial Court's decision under the substantial evidence rule. This position relies on the proposition that the right to vote is not a fundamental right under the U. S. Constitution and thus does not require an independent review by the appellate court(s). *Amicus* submits that this Court should review and decide this issue, and that this question, alone, provides sufficient cause to grant *certiorari*. The right of suffrage in state as well as federal elections is "established and guaranteed by the Constitution." *Lassiter v. Northampton City Board of Elections*, 360 U.S. 45, 51 (1958). With consistency and emphasis, this Court articulated this proposition in *Reynolds v. Simms*, *supra*, stating that:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting free exercise of a franchise." *Reynolds v. Simms*, *supra*, 377 U.S. at 555.

Indeed the California Supreme Court, in *Otsuka v. Hite*, 64 Cal. 2d 596 (1966), recognized the franchise as a fundamental constitutional liberty which flows "from the wellsprings of our National heritage." *Otsuka v. Hite*, 64 Cal. 2d at 602. Further, such right is entitled to the same constitutional status as First Amendment rights. *Otsuka v. Hite*, 64 Cal. 2d at 601.

In matters of fundamental liberty, reviewing courts are not bound by trial Court findings but must make an "independent review" of the record. *E. g., Jacobelis v. Ohio*, 378 U.S. 184 (1964); *Haynes v. Washington*, 373 U.S. 503 (1963); *Napue v. Illinois*, 360 U.S. 264, 261 (1959); *Watts v. Indiana*, 338 U.S. 49 (1949); *Hoover and Allison Co. v. Evatt*, 324 U.S. 652 (1945); *Norris v. Alabama*, 294 U.S. 587 (1935). This rule is compelled as the appropriate legal standard when the court finds that the number of illegal votes equals the number of votes by which the election carried.

The cherished process by which citizens determine elections is a peculiar anomaly in the range of constitutional rights. It is predicated on assuring a uniquely objective and verifiable result. Neither circumstantial evidence nor the substantial evidence rule can adequately protect the fundamental rights of the franchise when applied to determine how illegal voters cast their ballot. The Constitution requires the counting of "yes" votes and "no" votes. The counting of "maybe" votes and "circumstantial" votes is an unwarranted and impermissible intrusion into the ballot box.

If the decision *sub juris* is allowed to stand, it will mean that because of the physically impossible task of proving whether the "yes" or "no" votes embraced illegal votes, the electorate cannot effectively challenge a clearly improper election.

The Constitutional pitfalls inherent in failing to overturn the proposition that the franchise is not a fundamental right are nowhere more poignantly dramatized than in *Canales v. City of Alviso*, 1 Civil, No. 31783, First App. Dist., Div. Two, filed August 21, 1973, cert. den., October 18, 1973. In that decision, the Court of Appeal applied the substantial evidence rule to review both the number of illegal votes and how such votes were in fact cast. *Canales v. City of Alviso, supra*, Civil No. 31783, p. 3. Therein the patently unworkable nature of the substantial evidence rule to determine how illegal votes were cast was inadvertently underscored. The Court sustained the trial Court's finding that there was insufficient evidence to resolve the question as to how three critical illegal voters voted. *Canales v. City of Alviso, supra*, 1 Civil, No. 31783, pp. 18, 19, 20. Moreover, to rely on testimony of the very people who cast illegal votes as a basis to establish substantial evidence is fraught with built-in hazzards, adding insult to constitutional injury. The California Supreme Court recognized the force of this problem when it agreed with counsel in *Russell v. McDowell, supra*, 83 Cal. 70 at 73, when he said:

> "There is but one means of proving how the illegal voter has cast his vote; that is to say, by his own testimony, which is more likely to be false than true; and consequently the attempt

> to prove how illegal votes have been cast can only result in aggravation of the fraud."

The Court again demonstrated this problem in *Canales v. City of Alviso, supra*, 3 Cal. 3d 118 at 128, when it recognized both that a witness may change his mind after signing a petition or "that a strong proponent of consolidation who voted illegally would lie to preserve the result of the election." *Canales v. City of Alviso, supra*, 3 Cal. 3d at 128.

The California courts subjected the fundamental right of a fair and undiluted franchise to the abject uncertainty and unfairness of the substantial evidence rule to accurately determine how illegal votes were cast. No other conclusion is permitted by the Court of Appeal's illustrative treatment of one illegal voter:

> "As to Mrs. Canha, there was also conflicting evidence. Although she had signed the petition for consolidation, she testified unequivocally that she had voted against consolidation. Contestants argue that her testimony is inherently incredible in view of her close association with a number of proponents of consolidation. However, it is well settled that the credibility of a witness is exclusively within the jurisdiction of the trial court. Thus, there is substantial evidence to support the finding that Mrs. Canha voted against consolidation." *Canales v. City of Alviso, supra*, 1 Civil, No. 31783, pp. 24-25.

In an election where illegal votes equal the number by which the election carried, there is no more certain path to uncertainty and unfairness than to employ either the substantial evidence rule or circumstantial evidence to determine how illegal votes were cast and hence the election outcome.

CONCLUSION

Because the issues presented in this case are of paramount importance to the fundamental rights guaranteed by the Fourteenth Amendment and to vindication of the interests secured thereunder, *amicus curiae* respectfully request this Court to grant the *Petition for Writ of Certiorari.*

Respectfully submitted,

DELIZONNA, BOURHIS & BOURHIS,
By HARRY J. DELIZONNA &
RAY L. BOURHIS,
Attorneys for Amicus Curiae

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AFFIDAVIT OF SERVICE

HARRY J. DELIZONNA, being first duly sworn, under oath, deposes and says:

1. That on the 18th day of January, 1974, three copies of the Brief of Alviso Ad Hoc Committee, *Amicus Curiae*, in Support of Petition for Writ of Certiorari were mailed, postage prepaid, to:

CITY OF ALVISO
FABER L. JOHNSTON, ESQ.
First National Bank Building, No. 711
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City Attorney's Office
151 West Mission Street
San Jose, California 95110

JESUS CANALES, et. al.
STEPHEN V. MANLEY, ESQ.
Community Legal Services
330 North Market Street
San Jose, California 95110

2. That all parties required to be served have been served.

Subscribed and sworn to before me this 18th day of January, 1974, at San Jose, California.

.....

HARRY J. DELIZONNA

Subscribed and sworn to before me this 18th day of January, 1974, at San Jose, California.

.....

NOTARY PUBLIC